Mohd Amin bin Mohd Razali & Ors v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 05-02 OF 2002(W)—05-20 OF 2002(W)
ABDUL MALEK AHMAD, SITI NORMA YAACOB AND HAIDAR FCJJ
26 JUNE 2003

Criminal Law *— Penal Code (Malaysia) — s 121 — Waging war against the Yang di-Pertuan Agong — Certificate by Public Prosecutor under Essential (Security Cases) Regulations 1975 — Whether court was obliged to call on accused to enter on his defence at the end of prosecution's case even if prima facie case not proven against him — Whether defence must be called in all cases which had been certified under Essential (Security Cases) Regulations 1975*

Criminal Procedure *— Appeal — Sentence, against — Appellants convicted under s 121 of Penal Code — Certificate by Public Prosecutor under Essential (Security Cases) Regulations 1975 — Whether trial judge had misdirected himself by calling the defence under s 182A of the Criminal Procedure Code instead of reg 17 of Essential (Security Cases) Regulations 1975 — Whether appellants prejudiced by stance of prosecution in resorting to normal rules of procedure and evidence instead of rules of procedure under Essential (Security Cases) Regulations 1975*

Criminal Procedure *— Prosecution — Prima facie case — Appellants charged under s 121 of Penal Code — Certificate by public prosecutor under Essential (Security Cases) Regulations 1975 — Whether court was obliged to call on accused to enter on his defence at the end of prosecution's case even if prima facie case not proven against him — Whether defence must be called in all cases which had been certified under Essential (Security Cases) Regulations 1975 — Whether court still bound by majority decision of Federal Court in Public Prosecutor v Sihabduin bin Hj Salleh & Anor — Essential (Security Cases) Regulations 1975 regs 13, 17*

Evidence *— Burden of proof — Prosecution's burden — Close of prosecution's case — Appellants charged under s 121 of Penal Code — Certificate by public prosecutor under Essential (Security Cases) Regulations 1975 — Whether court was obliged to call on accused to enter on his defence at the end of prosecution's case even if prima facie case not proven against him — Whether defence must be called in all cases which had been certified under Essential (Security Cases) Regulations 1975 — Whether court still bound by majority decision of Federal Court in Public Prosecutor v Sihabduin bin Hj Salleh & Anor — Essential (Security Cases) Regulations 1975 regs 13, 17*

The 19 appellants were charged with the offence of waging war against the Yang di-Pertuan Agong under s 121 of the Penal Code. The learned public prosecutor had issued out a certificate pursuant to the Essential (Security Cases) Regulations 1975 ('ESCAR'), which in effect had classified the offence with which the appellants were charged as a security offence. The charge against all the appellants read as follows: 'That all of you from the month of June 2000 until 6 July 2000 at various places in the state of Perak Darul Ridzuan namely: (a) Post 2, Km 19, Kuala Rhui, Jalanraya Timur Barat, Grik, Hulu Perak ('Kuala Rhui camp'); (b) Batalion 304, Infantri (AW),

Kem Grik, Grik, Hulu Perak ('Kem 304 camp'); and (c) Bukit Jenalik, Kemajuan Tanah Ngor Sauk, Mukim Cagar Galah, Daerah Kuala Kangsar, waged war against the Yang di-Pertuan Agong and thereby committed an offence punishable under s 121 of the Penal Code'. Led by the first appellant, who was the president of the Al-Maunah group and the Khalifah Mujahuddin Malaysia, the appellants staged an arms heist at the Kuala Rhui camp and the Kem 304 camp. Following the arms heist, the first appellant distributed the seized arms to the other appellants for practice purposes. It was following the unusual sounds of firearms that the security forces were alerted. A number of security forces were deployed to that area. Two police personnel, namely, Sergeant Mohd Shah and Detective Corporal Sanghadevan, a civilian and an army personnel, Trooper Matthew were taken hostages by the Al-Maunah group. Trooper Matthew was shot in the leg by the first appellant, who then ordered the tenth appellant to shoot Trooper Matthew in cold blood. Detective Corporal Sanghadevan was shot dead in a cross-fire between the security forces and the Al-Maunah group. The first appellant was also responsible for directing his men to, inter alia, bomb the Carlsberg brewery at Shah Alam, the Guinness and Anchor breweries at Petaling Jaya and the Hindu temple at Batu Caves. The second appellant was the deputy president of the Al-Maunah group and the first appellant's right hand man. He was charged with training the members of the group as to the use of the various arms seized at the army camps. After the trial, the appellants were convicted under the said s 121 of the Penal Code. The first, second and third appellants were sentenced to death while the remaining 16 appellants were each sentenced to life imprisonment. The learned High Court judge held that notwithstanding the fact that the 19 appellants had been tried in accordance with the ESCAR provisions and that reg 13 thereof stipulated that at the close of the case for the prosecution, the court shall call on the accused to enter on his defence, the court was still bound by the majority decision of the Federal Court in the case of *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 wherein it was held that in a security case, the court was not obliged to call on the accused to enter on his defence at the end of the prosecution case unless a prima facie case had been proven against him. Counsel for the first appellant argued that the learned trial judge had misdirected himself by calling the defence under s 182A of the Criminal Procedure Code ('CPC') instead of reg 17 of ESCAR. As for the charge against the appellants, it was argued that since common intention was not reflected in the charge against the appellants, they each faced the charge individually and not together. These were the appeals by the appellants against the sentences. Meanwhile, the prosecution also cross-appealed against the sentences passed on the fourth to the nineteenth appellants.

Held, dismissing the appellants' appeals and prosecution's cross-appeals but allowing the cross appeal against the tenth appellant:

(1) (per **Abdul Malek Ahmad FCJ**) Although the ESCAR was not used despite the certificate presented at the outset, the appellants had not been prejudiced by the stance of the prosecution team in resorting to the normal rules of procedure and evidence. If at all, this concession was more to the advantage of the appellants. Since the trial proceeded on an ESCAR certificate, the appeal would be direct to the Federal Court (see p 146E).

(2) (per **Abdul Malek Ahmad FCJ**) It was clear that under reg 13 of ESCAR, when the case for the prosecution was closed, the court shall call on the accused to enter on his defence and there was no mention of the standard of proof. Its effect was made clearer when reg 17 of ESCAR was read in that the decision on the guilt or innocence of the accused can be made only after hearing both the prosecution and the defence. Accordingly, the dissenting judgment in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* appeared to be the correct view. In effect, the defence must be called in all cases which had been certified under the ESCAR (see pp 146F–G, 147F); *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 not followed.

(3) (per **Abdul Malek Ahmad FCJ**) Although common intention was not reflected in the charge against the appellants, s 34 of the Penal Code can be applied if the evidence on record established common intention. In such a situation, the absence of charge, by itself, could not be said to be fatal, and before a conviction can be set aside, it must be shown that the absence of charge had caused prejudice to the appellants, and in the circumstances of the present case, it had not (see p 149D–F).

(4) (per **Abdul Malek Ahmad FCJ**) Accordingly, the appeals were dismissed except that the cross appeal against the tenth appellant was allowed and the sentence of life imprisonment imposed on him was substituted with the sentence of death (see p 149I).

(5) (per **Siti Norma Yaacob FCJ**) In view of the clear and unambiguous provisions of regs 13 and 17 of ESCAR, the dissenting judgment in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* must prevail (see p 150A–B); *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 not followed.

(6) (per **Siti Norma Yaacob FCJ**) In his judgment, the learned trial judge had referred to the principles of sentencing, and guided by case law, he had considered the due weight to be given to the penalty of the offence committed, the public interest factor and the mitigating pleas put forward. Given the facts of this case, there was no reason to disturb the exercise of the judge's discretion as regards sentence. Although the first appellant was convicted of an offence for which nobody had been convicted before, this trend must be nipped in the bud and public interest demanded that in the rarest of such rare cases, life imprisonment would not be an appropriate penalty. Accordingly, the sentence

of death pronounced on the first appellant was confirmed (see p 153F–H). A

(7) (per **Siti Norma Yaacob FCJ**) As the first appellant's right hand man, the second appellant must have known of the former's plans to topple the legitimate government of the day. His deep involvement and his active participation had convinced the learned judge to impose the maximum sentence and there was no reason to disagree on that finding. To that end, the sentence of death imposed by the court below was also confirmed (see p 154D–E). B

(8) (per **Siti Norma Yaacob FCJ**) The third appellant was a serving military officer with the Malaysian Armed Forces holding the rank of a Major at the time of the offence. It was his acts of betrayal and disloyalty that had convinced the learned High Court judge to prefer the maximum sentence against him. That finding was endorsed and the sentence of death imposed on the third appellant was accordingly confirmed (see p 154E, G). C D

(9) (per **Siti Norma Yaacob FCJ**) The learned High Court judge had rightly considered the less than dominant roles played by the fourth to the 19th appellants and, except for the sentence imposed on the tenth appellant, there was no reason to disturb the sentences imposed on them. The exception was the tenth appellant who showed no qualms about shooting Trooper Matthew in cold blood when ordered to do so by the first appellant. It was this one act of brutal violence that singled him out as demonstrating the extent to which he was capable of doing so as to meet the illegal objective of the Al-Maunah. The sentence of life imprisonment handed to the tenth appellant was inadequate and the same was accordingly substituted with the sentence of death (see p 157F–H). E F

(10) (per **Siti Norma Yaacob FCJ**) Therefore, the appeals by the first, second and third appellants against their sentences of death were dismissed. The cross-appeals of the public prosecutor against the sentences of the fourth to the 19th appellants, the eleventh to the nineteenth appellants were also dismissed and their sentences of life imprisonment were confirmed. However, the cross appeal of the public prosecutor against the sentence of the tenth appellant was allowed and the death penalty was substituted for the sentence of life imprisonment (see p 157H–I). G H

(11) (per **Haidar FCJ**) In respect of security cases under ESCAR, the burden of proof imposed on the prosecution was a departure from the ordinary criminal cases provided by s 182A of the CPC. However, the learned High Court judge had rightly ruled that he was bound by the majority decision of the Federal Court in *Public Prosecutor v Sihabduin bin Hj Salleh & Anor* which held that in a security case at the end of the prosecution case, the court was not obliged to call on the accused to enter on his defence unless the I

prosecution had then proved a prima facie case against him. In the present appeal, Abdul Malek Ahmad and Siti Norma Yaakob FCJJ took the view that regs 13 and 17 of ESCAR were specific provisions which override the general provision on the prima facie case in the CPC and preferred the dissenting judgment in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor*. Similarly, His Lordship preferred the dissenting judgment in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* and accordingly concurred with the views expressed by Abdul Malek Ahmad and Siti Norma Yaakob FCJJ (see pp 158B–D, F–G, 159A); *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 not followed.

(12)(per **Haidar FCJ**) As for the substitution of the sentence of life imprisonment in respect of the tenth appellant to one of sentence of death by the learned Chief Judge (Sabah and Sarawak) in the instant appeal, His Lordship agreed with it for the reasons stated by the learned CJ (Sabah and Sarawak). Accordingly, the appeals by the first, second and third appellants against their sentences of death were dismissed and the cross-appeals by the public prosecutor against the sentences of life imprisonment in respect of the fourth to the ninth appellants and the eleventh to nineteenth appellants were also dismissed (see p 158A–C).

(13)(per **Steve Shim Lip Kiong CJ (Sabah & Sarawak)**) The issues raised by the defence were, inter alia, whether the omission of the words 'jointly' or 'with common intention' in the charge had rendered it defective in law and whether the alternative charge under s 122 of the Penal Code against some of the accused had attracted the provisions of art 8(1) of the Federal Constitution. After discussing the issues at some length, the learned trial judge came to a negative conclusion on both counts. There are no errors involved and hence, no reason to disturb those conclusions (see p 160D–F).

(14)(per **Steve Shim CJ (Sabah & Sarawak)**) Although the rules laid down in ESCAR were not strictly applied, it had caused no prejudice to the appellants whatsoever. In conducting the trial in accordance with the rules of practice and procedure set out in the CPC, there was no miscarriage of justice caused. Indeed, in doing so, it was in effect more to the benefit of the appellants. In any event, reg 3(1) of ESCAR specified that except varied by ESCAR, the ordinary practice and procedure, where appropriate, shall apply to security cases (see p 161F–G).

(15)(per **Steve Shim CJ (Sabah & Sarawak)**) Reading the judgment as a whole, it seemed clear that the learned trial judge had also side-stepped the rules of evidence provided in ESCAR. In security offences, the normal hearsay rule did not apply by virtue of reg 21(1) of ESCAR. Therefore, had the learned trial judge taken into consideration and applied the said reg 21(1), he would have little difficulty in admitting the transcripts, marked as

exhibits P151 and P152, which were alleged to contain hearsay evidence incriminating the appellants. The fact that he did not do so but had instead applied the normal hearsay rule, was a factor much to the benefit of the defence. There could be no prejudice and hence no miscarriage of justice involved in so far as the appellants were concerned. As such, notwithstanding the omission of the learned trial judge to apply the more draconian provisions of ESCAR, the appellants had had a fair trial in the High Court (see pp 161H, 162C–E).

(16)(per **Steve Shim CJ (Sabah & Sarawak)**) In holding that the prosecution had established a prima facie case against the accused at the end of the prosecution case, the learned trial judge had apparently applied the principle enunciated by the Federal Court in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* wherein it was held that in a security case, the court was not entitled to call on the defence unless the prosecution had established a prima facie case against him. In this connection, the learned public prosecutor who is also the Attorney-General, had urged the court to revisit *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* on account of reg 13 of ESCAR and adopt the dissenting view of Wan Suleiman FJ in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* who took the view that reg 13 read with reg 17 of ESCAR made it clear that the call to enter the defence must be made in any event and that the prima facie principle had no application in such a case. This call to jettison *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* had previously been raised by the public prosecutor in *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221 and *Md Desa Bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 but the Federal Court in those cases was not persuaded. On a careful consideration of the authorities cited, there was no good reason to depart from the majority view expressed in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor*. There was perfect sense in the observation of Raja Azlan Shah LP in *Public Prosecutor v Nordin bin Johan*, that justice and fair play had become such a fundamental principle in our adversarial system of trial that it required much more than the words used in reg 13 of ESCAR to dislodge it; (see pp 162F–163C, F–G) *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221 and *Md Desa Bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 followed.

(17)(per **Steve Shim CJ (Sabah & Sarawak)**) Having carefully gone through the trial judge's evaluation of the evidence adduced by the respective appellants, there was no reason to disturb his assessment. The trial judge had not erred in law and on the facts. He was correct in holding that the prosecution had proven the charge under s 121 of the Penal Code beyond reasonable doubt against all the accused and thereafter convicted them accordingly.

A Accordingly, it was appropriate to dismiss the appeals against conviction (see pp 163H–164A).

(18) (per **Steve Shim CJ (Sabah & Sarawak)**) As for the appeals by the first, second and third accused against the sentence, the learned trial judge had taken all relevant factors into consideration and had applied the correct principles in imposing not only the death sentences on the first, second and third accused but also, subject to one exception, the life sentences on the rest of the accused. The one exception related to the tenth appellant, [Editorial Note: In Steve Shim CJ (Sabah & Sarawak)'s judgment, Jemari bin Yusof was referred to as the fifth accused, instead of the tenth appellant] who had killed Trooper Matthew purportedly on the order of the first appellant. The tenth appellant must have known that the person he had shot and killed was a member of the police force and an officer of the law. The fact that the tenth appellant had shot Trooper Matthew in cold blood showed clearly not only his total disregard for human life but also the extent of his commitment to the common cause of overthrowing the government by force and violence. Given those circumstances, the tenth appellant was not merely obeying the orders of the first appellant but had willingly carried out a brutal act with the aim of striking fear at anyone who opposed their common objective of overthrowing the government by force and violence. It was a deliberate act of terror. The learned trial judge fell into error in not considering all these material factors. If he had, he would have imposed the appropriate sentence of death upon the tenth appellant. Accordingly, the learned public prosecutor's cross appeal against the sentence imposed on the tenth appellant was allowed. The life sentence imposed on him should be substituted to sentence of death. There was no merit in respect of the other appeals and counter appeals against sentence and they were accordingly dismissed (see pp 164D–165B).

[Bahasa Malaysia summary

Sembilan belas orang perayu dituduh kerana kesalahan melancarkan peperangan terhadap Yang di-Pertuan Agong di bawah s 121 Kanun Keseksaan. Pendakwa raya yang bijaksana telah mengeluarkan satu sijil menurut Peraturan-Peraturan Perlu (Kes-kes Keselamatan) (Pindaan) 1975 ('ESCAR'), yang pada hakikatnya mengklasifikasikan kesalahan tersebut yang perayu-perayu dipertuduhkan sebagai satu kesalahan keselamatan. Pertuduhan terhadap kesemua perayu-perayu dibaca seperti berikut: 'That all of you from the month of June 2000 until 6 July 2000 at various places in the state of Perak Darul Ridzuan namely: (a) Post 2, Km 19, Kuala Rhui, Jalanraya Timur Barat, Grik, Hulu Perak ('Kuala Rhui camp'); (b) Batalion 304, Infantri (AW), Kem Grik, Grik, Hulu Perak ('Kem 304 camp'); and (c) Bukit Jenalik, Kemajuan Tanah Ngor Sauk, Mukim Cagar Galah, Daerah

Kuala Kangsar, waged war against the Yang di-Pertuan Agong and thereby committed an offence punishable under s 121 of the Penal Code.' Diketuai oleh perayu pertama, yang merupakan presiden kumpulan Al-Maunah dan Khalifah Mujahuddin Malaysia, perayu-perayu telah mengadakan rompakan bersenjata di Kem Kuala Rhui dan Kem 304. Berikutan rompakan bersenjata tersebut, perayu pertama telah mengagihkan rampasan senjata kepada perayu-perayu lain untuk tujuan praktikal. Disebabkan bunyi-bunyi pelik senjata api yang amaran diberi kepada pihak berkuasa keselamatan. Sebilangan dari pihak berkuasa keselamatan telah diatur kedudukannya ke kawasan tersebut. Dua orang pegawai polis, iaitu, Sarjan Mohd Shah dan Detektif Korporal Sanghadevan, orang awam dan seorang askar, Trooper Matthew telah diambil sebagai orang tebusan oleh kumpulan Al-Maunah tersebut. Trooper Matthew telah ditembak di kaki oleh perayu pertama, yang kemudiannya mengarahkan perayu kesepuluh menembak Trooper Matthew dengan kejam. Detektif Korporal Sanghadevan telah ditembak dalam kejadian tembak-menembak antara pihak berkuasa keselamatan dan kumpulan Al-Maunah. Perayu pertama juga bertanggungjawab mengarahkan orang-orang beliau untuk, antara lain, mengebom kilang Carlsberg di Shah Alam, kilang-kilang Guinness dan Anchor di Petaling Jaya dan kuil Hindu di Batu Caves. Perayu kedua adalah timbalan presiden kumpulan Al-Maunah dan orang kanan perayu pertama. Beliau dituduh melatih ahli-ahli kumpulan tersebut dalam menggunakan pelbagai senjata yang telah dirampas dari kem-kem askar. Selepas perbicaraan, perayu-perayu telah disabitkan di bawah s 121 Kanun Keseksaan. Perayu-perayu pertama, kedua dan ketiga dijatuhkan hukuman mati dan 16 perayu-perayu yang lain masing-masing dijatuhkan hukuman penjara seumur hidup. Hakim Mahkamah Tinggi yang bijaksana memutuskan meskipun pada hakikatnya 19 orang perayu telah dibicarakan menurut peruntukan-peruntukan ESCAR dan peraturan 13 menetapkan pada penutup kes bagi pihak pendakwa, mahkamah hendaklah memanggil tertuduh untuk memasuki pembelaan beliau, mahkamah masih terikat dengan keputusan majoriti Mahkamah Persekutuan dalam kes *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 di mana ia diputuskan bahawa dalam satu kes keselamatan, mahkamah tidak diwajibkan memanggil tertuduh untuk memasuki pembelaan beliau di akhir kes pihak pendakwa kecuali jika ada kes prima facie yang telah dibuktikan terhadap beliau. Peguam bagi pihak perayu pertama berhujah bahawa hakim yang bijaksana telah salah arah apabila memanggil untuk pembelaan di bawah s 182A Kanun Acara Jenayah ('CPC') dan bukan peraturan 17 ESCAR. Berkenaan pertuduhan terhadap perayu-perayu, ia dihujahkan bahawa memandangkan niat bersama tidak digambarkan dalam pertuduhan terhadap perayu-perayu, masing-masing dituduh berasingan dan bukan bersama. Berikut adalah rayuan-rayuan oleh perayu-perayu terhadap hukuman-hukuman tersebut. Sementara itu, pihak pendakwa juga telah membuat rayuan balas terhadap

A B C D E F G H I

A hukuman-hukuman yang dijatuhkan ke atas perayu-perayu keempat dan kesembilan.

Diputuskan, menolak rayuan-rayuan perayu-perayu dan rayuan-rayuan-rayuan balas pihak pendakwa tetapi membenarkan rayuan balas terhadap perayu kesepuluh:

B

(1) (oleh **Abdul Malek Ahmad HMP**) Walaupun ESCAR tidak digunakan meskipun sijil tersebut dikemukakan pada permulaannya, perayu-perayu tidak diprejudiskan oleh pendirian pihak pendakwa yang menggunakan peraturan-peraturan prosedur dan keterangan yang biasa. Jika apa sekalipun, konsesi C ini lebih membawa kebaikan kepada perayu-perayu. Memandangkan perbicaraan tersebut telah dimulakan berdasarkan sijil ESCAR, rayuan tersebut diarahkan ke Mahkamah Persekutuan (lihat ms 146E).

(2) (oleh **Abdul Malek Ahmad HMP**) Adalah jelas bahawa D peraturan 13 ESCAR, apabila kes untuk pihak pendakwa ditutup, mahkamah hendaklah memanggil tertuduh untuk memasukkan pembelaan beliau dan tiada apa-apa disebut tentang piawai pembuktian. Kesannya lebih jelas apabila peraturan 17 ESCAR dibaca di mana keputusan sama ada tertuduh bersalah atau tidak boleh dibuat hanya selepas perbicaraan kedua-dua pihak E pendakwa dan pihak pembela. Sewajarnya, penghakiman bertentangan dalam *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* merupakan pandangan yang betul. Oleh demikian, pihak pembela hendaklah memanggil semua kes-kes yang disahkan di bawah ESCAR (lihat ms 146F–G, 147F); *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 tidak diikut.

F

(3) (oleh **Abdul Malek Ahmad HMP**) Walaupun niat bersama tidak digambarkan dalam pertuduhan terhadap perayu-perayu, s 34 Kanun Keseksaan boleh dipakai jika keterangan atas rekod membuktikan niat bersama. Dalam keadaan sedemikian, ketiadaan pertuduhan, dengan sendirinya, tidak boleh dikatakan G memudaratkan, dan sebelum suatu sabitan boleh diketepikan, ia perlu dibuktikan bahawa ketiadaan pertuduhan menyebabkan prejudis kepada perayu-perayu, dan dalam keadaan kes semasa, ia tidak begitu (lihat ms 149D–F).

(4) (oleh **Abdul Malek Ahmad HMP**) Sewajarnya, rayuan-rayuan tersebut ditolak kecuali rayuan balas terhadap perayu kesepuluh H dibenarkan dan hukuman penjara seumur hidup yang dikenakan ke atas beliau digantikan dengan hukuman mati (lihat ms 149I).

(5) (oleh **Siti Norma Yaacob HMP**) Berdasarkan peraturan-peraturan 13 dan 17 ESCAR yang jelas dan tidak taksa, penghakiman bertentangan dalam *Public Prosecutor v Sihabduin* I *bin Haji Salleh & Anor* harus kekal (lihat ms 150A–B); *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 tidak diikut.

(6) (oleh **Siti Norma Yaacob HMP**) Dalam penghakiman beliau, hakim yang bijaksana telah merujuk kepada prinsip-prinsip penghukuman, dan dibantu dengan kes, beliau telah menimbangkan beban yang sewajarnya diberikan ke atas penalti kesalahan yang dilakukan, di mana faktor kepentingan awam dan pli-pli mitigasi dikemukakan. Berdasarkan fakta-fakta kes ini, tiada sebab untuk mengganggu budi bicara hakim berkaitan hukuman. Walaupun perayu pertama telah disabitkan dengan satu kesalahan yang tidak pernah disabitkan ke atas sesiapa sebelum ini, trend ini patut dipatahkan pada permulaannya dan kepentingan awam menuntut dalam kes-kes yang jarang sekali berlaku, hukuman penjara seumur hidup bukan satu penalti yang sesuai. Sewajarnya, hukuman mati yang diisytiharkan ke atas perayu adalah disahkan (lihat ms 153F–H).

(7) (oleh **Siti Norma Yaacob HMP**) Memandangkan orang kuat perayu pertama, perayu kedua mungkin telah mengetahui rancangan-rancangan perayu pertama untuk menumpaskan kerajaan yang sah. Penglibatan mendalam dan penyertaan aktif beliau meyakinkan hakim yang bijaksana untuk mengenakan hukuman maksima dan tiada sebab untuk tidak bersetuju dengan penemuan tersebut. Oleh demikian, hukuman mati yang dikenakan oleh mahkamah bawahan juga disahkan (lihat ms 154D–E).

(8) (oleh **Siti Norma Yaacob HMP**) Perayu ketiga merupakan seorang pegawai tentera yang berkhidmat dengan Angkatan Tentera Malaysia dengan memegang pangkat Major semasa kejadian berlaku. Ia tindakan-tindakan pengkhianatan dan ketidaksetiaan beliau yang meyakinkan hakim Mahkamah Tinggi untuk mengenakan hukuman maksima ke atas beliau. Penemuan tersebut telah diindorskan dan hukuman mati yang dikenakan ke atas perayu ketiga dengan wajarnya disahkan (lihat ms 154E, G).

(9) (oleh **Siti Norma Yaacob HMP**) Hakim Mahkamah Tinggi telah dengan betul menimbangkan peranan-peranan yang kurang penting yang telah dimainkan oleh perayu-perayu kesembilan hingga ke-19 dan, kecuali hukuman yang dikenakan ke atas perayu kesepuluh, tiada sebab untuk mengganggu hukuman-hukuman yang dikenakan ke atas mereka. Pengecualiannya adalah perayu kesepuluh yang tidak berasa ragu-ragu untuk menembak Trooper Matthew dengan kejam apabila diarahkan berbuat demikian oleh perayu pertama. Satu-satunya perbuatan ganas inilah yang membezakan beliau yang mendemonstrasikan setakat mana beliau mampu bertindak untuk memenuhi objektif Al-Maunah yang menyalahi undang-undang. Hukuman penjara seumur hidup yang dijatuhkan ke atas perayu kesepuluh tidak memadai dan yang sama dengan wajarnya telah digantikan dengan hukuman mati (lihat ms 157F–H).

(10)(oleh **Siti Norma Yaacob HMP**) Oleh demikian, rayuan-rayuan oleh perayu-perayu pertama, kedua dan ketiga terhadap hukuman-hukuman mati mereka ditolak. Rayuan-rayuan balas pendakwa raya terhadap perayu-perayu keempat hingga kesembilan, ke-11 hingga ke-19 juga ditolak hukuman penjara seumur hidup mereka disahkan. Namun begitu, rayuan balas pendakwa raya terhadap hukuman perayu kesepuluh dibenarkan dan penalti mati digantikan telah digantikan untuk hukuman penjara seumur hidup (lihat ms 157H–I).

(11)(oleh **Haidar HMP**) Berhubung kes-kes keselamatan di bawah ESCAR, beban bukti yang terletak atas pendakwa raya merupakan satu penyimpangan dari kes-kes jenayah biasa yang diperuntukkan oleh s 182A KAJ. Namun begitu, hakim Mahkamah Tinggi yang bijaksana telah memutuskan dengan betul bahawa beliau terikat dengan keputusan majoriti Mahkamah Persekutuan dalam *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* yang telah memutuskan bahawa dalam suatu kes keselamatan di akhir kes pendakwa, mahkamah tidak diwajibkan untuk memanggil tertuduh untuk memasukkan pembelaannya kecuali jika pihak pendakwa telahpun membuktikan satu kes prima facie terhadap beliau. Dalam rayuan semasa, Abdul Malek Ahmad dan Siti Norma Yaakob HHMP berpandangan bahawa peraturan-peraturan 13 dan 17 ESCAR adalah peruntukan-peruntukan spesifik yang mengatasi peruntukan am untuk kes prima facie dalam KAJ dan membuat penghakiman bertentangan dalam *Public Prosecutor v Sihabduin bin Haji Salleh & Anor*. Begitu juga, Yang Arif telah membuat penghakiman bertentangan dalam *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* dan oleh demikian bersetuju dengan pandangan yang dinyatakan oleh Abdul Malek Ahmad dan Siti Norma Yaakob HHMP (lihat ms 158B–D, F–G, 159A); *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 tidak diikut.

(12)(oleh **Haidar HMP**) Berhubung penggantian hukuman penjara seumur hidup ke atas perayu kesepuluh kepada satu hukuman mati oleh HB (Sabah and Sarawak) yang bijaksana dalam rayuan semasa, Yang Arif bersetuju dengannya berdasarkan sebab-sebab yang dinyatakan oleh HB (Sabah and Sarawak). Sewajarnya, rayuan-rayuan oleh perayu-perayu pertama, kedua dan ketiga telah ditolak dan rayuan-rayuan balas oleh pendakwa raya terhadap hukuman penjara seumur hidup ke atas perayu-perayu keempat hingga kesembilan dan perayu-perayu ke-11 hingga ke-19 juga telah ditolak (lihat ms 158A–C).

(13)(oleh **Steve Shim HB (Sabah & Sarawak)**) Persoalan-persoalan yang ditimbulkan oleh pihak pembela adalah, antara lain, sama ada peninggalan perkataan 'jointly' atau 'with common intention' dalam pertuduhan menyebabkan ia menjadi defektif di sisi undang-undang dan sama ada pertuduhan alternatif di bawah

s 122 Kanun Keseksaan terhadap beberapa orang tertuduh telah menarik perhatian peruntukan-peruntukan perkara 8(1) Perlembagaan Persekutuan. Setelah membincangkan persoalan-persoalan tersebut dengan panjang lebar, hakim perbicaraan yang bijaksana tiba kepada satu kesimpulan yang negatif untuk kedua-dua pertuduhan tersebut. Tidak terdapat sebarang kesilapan dan justeru itu, tiada sebab untuk mengganggu kesimpulan-kesimpulan tersebut (lihat ms 160D–F).

(14)(oleh **Steve Shim HB (Sabah & Sarawak)**) Walaupun peraturan-peraturan yang dinyatakan di bawah ESCAR tidak digunakan dengan betul, ia tidakpun menyebabkan berlaku apa-apa prejudis ke atas perayu-perayu tersebut. Dalam pengendalian perbicaraan menurut amalan peraturan dan prosedur yang ditetapkan dalam KAJ, tiada ketidakadilan berlaku. Sememangnya, dengan berbuat demikian, ia sebenarnya merupakan kebaikan kepada perayu-perayu. Dalam apa keadaan, peraturan 3(1) ESCAR menetapkan bahawa kecuali diubah oleh ESCAR, amalan dan prosedur biasa, di mana adalah sesuai, hendaklah terpakai untuk kes-kes keselamatan (lihat ms 161F–G).

(15)(oleh **Steve Shim HB (Sabah & Sarawak)**) Dengan membaca penghakiman tersebut secara menyeluruh, ia adalah jelas bahawa hakim perbicaraan yang bijaksana juga telah menyimpang dari peraturan keterangan yang diperuntukkan dalam ESCAR. Dalam kesalahan-kesalahan keselamatan, peraturan dengar cakap biasa tidak terpakai menurut peraturan 21(1) ESCAR. Oleh itu, sekiranya hakim perbicaraan yang bijaksana telah mengambilkira dan memakai peraturan 21(1) tersebut, adalah tidak sukar bagi beliau mengakui transkrip-transkrip, yang ditanda sebagai ekshibit-ekshibit P151 dan P152, yang dikatakan mengandungi keterangan dengar cakap yang menunjukkan bahawa perayu-perayu adalah bersalah. Hakikat bahawa beliau tidak berbuat demikian tetapi sebaliknya memakai peraturan dengar cakap biasa, adalah satu faktor yang lebih bermanfaat kepada pihak pembela. Tidak mungkin terdapat apa-apa prejudis dan oleh itu tiada ketidakadilan berlaku di mana perayu-perayu adalah terlibat. Oleh itu, meskipun terdapat peninggalan oleh hakim perbicaraan yang bijaksana untuk memakai peruntukan-peruntukan draconian ESCAR, perayu-perayu sememangnya telah dibicarakan dengan adil di Mahkamah Tinggi (lihat ms 161H, 162C–E).

(16)(oleh **Steve Shim HB (Sabah & Sarawak)**) Dengan memutuskan bahawa pihak pendakwa telah membuktikan satu kes prima facie terhadap tertuduh di akhir kes pihak pendakwa, hakim perbicaraan yang bijaksana telah memakai prinsip yang dinyatakan oleh Mahkamah Persekutuan dalam *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* di mana telah diputuskan bahawa dalam suatu kes keselamatan, mahkamah tidak berhak

untuk memanggil pihak pembela kecuali jika pihak pendakwa telah membuktikan satu kes prima facie terhadap beliau. Dalam hal sebegini, pendakwa raya yang bijaksana yang juga Peguam Negara, telah mendesak mahkamah untuk melihat semula *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* berhubung peraturan 13 ESCAR dan menggunakan pandangan bertentangan Wan Suleiman HP dalam *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* yang berpandangan bahawa peraturan 13 dibaca dengan peraturan 17 ESCAR dengan jelas menunjukkan bahawa panggilan untuk memasukkan pembelaan hendaklah dibuat dalam apa keadaanpun dan bahawa prinsip prima facie tidak terpakai dalam kes sedemikian. Saranan untuk membuang *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* telah ditimbulkan oleh pendakwa raya dalam *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221 dan *Md Desa Bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 tetapi Mahkamah Persekutuan dalam kes-kes tersebut tidak yakin. Setelah membuat pertimbangan teliti autoriti-autoriti yang dipetik, tidak terdapat sebab yang baik untuk menyimpang dari pandangan majoriti yang dinyatakan dalam *Public Prosecutor v Sihabduin bin Haji Salleh & Anor.* Wujud pertimbangan baik dalam pemerhatian Raja Azlan Shah LP dalam *Public Prosecutor v Nordin bin Johan,* bahawa keadilan merupakan prinsip yang penting dalam sistem adversarial perbicaraan di mana ia memerlukan lebih daripada perkataan-perkataan yang digunakan dalam peraturan 13 ESCAR untuk menyingkirnya (lihat ms 162F–163C, F–G); *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221 dan *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 diikut.

(17)(oleh **Steve Shim HB (Sabah & Sarawak)**) Setelah meneliti penilaian hakim perbicaraan terhadap keterangan yang dikemukakan oleh perayu-perayu masing-masingnya, tiada sebab untuk mengganggu penilaian beliau. Hakim perbicaraan tidak terkhilaf di sisi undang-undang dan berdasarkan fakta. Beliau telah membuat keputusan betul bahawa pihak pendakwa telah membuktikan pertuduhan di bawah s 121 Kanun Keseksaan melampaui keraguan munasabah terhadap kesemua tertuduh dan selepas itu telah menyabitkan mereka dengan sewajarnya. Oleh demikian, adalah sesuai untuk menolak rayuan-rayuan tersebut terhadap sabitan (lihat ms 163H–164A).

(18)(oleh **Steve Shim HB (Sabah & Sarawak)**) Berhubung rayuan-rayuan tertuduh pertama, kedua dan ketiga terhadap hukuman, hakim perbicaraan yang bijaksana telah mengambilkira semua faktor-faktor relevan dan telah memakai prinsip-prinsip yang betul bukan semasa menjatuhkan hukuman-hukuman mati ke atas perayu-perayu pertama, kedua dan ketiga tetapi juga, tertakluk kepada satu pengecualian, hukuman-hukuman mati ke

atas tertuduh yang lain. Satu-satunya pengecualian yang berkaitan perayu kesepuluh, [Nota Editorial: dalam penghakiman Steve Shim HB (Sabah & Sarawak), Jemari bin Yusof dirujuk sebagai perayu kelima, dan bukan perayu kesepuluh] yang telah membunuh Trooper Matthew seperti yang dikatakan atas arahan perayu pertama. Perayu kesepuluh semestinya telah mengetahui bahawa orang yang beliau tembak dan bunuh adalah seorang ahli pihak berkuasa polis dan pegawai penguatkuasa undang-undang. Hakikat bahawa perayu kesepuluh telah menembak Trooper Matthew dengan kejam jelas menunjukkan bahawa bukan sahaja beliau tidak mengendahkan langsung nyawa seorang manusia tetapi juga tahap komitmen beliau bagi tujuan menggulingkan kerajaan melalui kuasa dan keganasan. Berdasarkan keadaan-keadaan berikut, perayu kesepuluh bukan sahaja mematuhi arahan-arahan perayu pertama tetapi sanggup melaksanakan perbuatan kejam yang bertujuan untuk menakutkan sesiapa yang membangkang objektif bersama mereka untuk menggulingkan kerajaan melalui kuasa dan keganasan. Ia satu tindakan samseng yang disengajakan. Hakim perbicaraan yang bijaksana terkhilaf kerana tidak menimbangkan kesemua faktor-faktor material tersebut. Sekiranya beliau telah berbuat demikian, beliau akan pasti menjatuhkan hukuman mati yang sesuai terhadap perayu kesepuluh. Sewajarnya, rayuan balas pendakwa raya terhadap hukuman yang dikenakan ke atas perayu kesepuluh dibenarkan. Hukuman penjara seumur hidup yang dijatuhkan ke atas beliau hendaklah digantikan dengan hukuman mati. Tiada merit berhubung rayuan-rayuan dan rayuan-rayuan balas lain terhadap hukuman dan yang berikut telah ditolak (lihat ms 164D–165B).]

A B C D E F G H I

Notes

For cases on appeals against sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 558–574.

For cases on Penal Code s 121, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1064.

For cases on prima facie cases, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2574–2577.

For cases on the prosecution's burden of proof, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 513–528.

Cases referred to

Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (refd)

Leith McDonald Ratten v The Queen [1972] AC 378 (refd)

Md Desa bin Hashim v PP [1995] 3 MLJ 350 (not folld)

Muhamad Safarudin bin Baba & Anor v PP [2002] 4 MLJ 353 (refd)

PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)

PP v Nordin bin Johan & Anor [1983] 2 MLJ 221 (not folld)

A *PP v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 (not folld)
Subramaniam v PP [1956] 22 MLJ 220 (refd)

Legislation referred to

B Criminal Procedure Code ss 170, 182A
Dangerous Drugs Act 1952 ss 6, 37(d), 37(da)
Essential (Security Cases) Regulations 1975 regs 2(2), 3(1), 13, 17, 21(1)
Evidence Act 1950 s 2
Federal Constitution arts 5(1), 8(1)
C Penal Code ss 34, 121, 122, 130A(b)

Appeal from: Criminal Trial No 45–34 of 2000 (High Court, Kuala Lumpur)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the
D first appellant.

Hasnal Rezua Merican (*Mohd Yusmadi Mohd Yusoff* with him) (*Zabidi & Co*) for the second and third appellants.

Surina Suhaimi (*Hasnal Rezua Merican* and *Mohd Yusmadi Mohd Yusoff* with her) (*Zabidi & Co*) for the fourth, seventh, eighth, 14th, 15th and 19th appellants and cross respondents.

E *Zainal Ithnin* (*Jalaludin Ismail* and *Shahruddin Osman* with him) (*Zainal Ithnin & Partners*) for the fifth, sixth and 13th appellants and cross respondents.

Mohamed Hanipa bin Maidin (*Zaini Zainal* and (*Zulqarnain Lukman* with him) (*Mohamed Hanipa & Assoc*) for the ninth, 11th, 16th, 17th and 18th
F appellants and cross respondents.

Zamani Ibrahim (*Faiz Fadzil, Mohd Hanif Idris* and *Leong Pak Yiew* with him) (*Zamani Ibrahim, Tarmizan & Co*) for the tenth and 12th appellants and cross respondents.

Dato' Seri Panglima Abdul Gani Patail (*Dato Mohd Yusof bin Hj Zainal Abiden, Tun Abdul Majid Tun Hamzah, Dato' Abdul Halim Aman,*
G *Salehuddin Saidin* and *Harith Sham* with him) (Attorney-General's Chambers) for the respondent and cross appellant.

Abdul Malek Ahmad FCJ: We heard the earlier submissions on 21, 22 and 29 October 2002 and reserved judgment. However, while discussing
H the points raised, we unanimously decided that further submissions were necessary as despite the fact that the case had proceeded on an Essential (Security Cases) Regulations 1975 ('the ESCAR') certificate by virtue of reg 2(2) thereof, the earlier submissions had centered on the normal rules of procedure and evidence and no mention had been made on the effect of ESCAR. The further submissions were heard on 22 January 2003.

I Karpal Singh acted for the first appellant who had been sentenced to death. In the course of the earlier submissions, he had appealed only against the sentence. He submitted that this was the first case of its kind but where

there is a choice of sentence between death and life imprisonment, the court ought to opt for the lower sentence. He conceded that the first appellant, now aged thirty and a first offender, was the mastermind but contended that the waging of war was only against the Yang di-Pertuan Agong and the arms heist and the assembly at Bukit Jenalik were the only action the group had taken. He added that the police and the military should have cordoned off the Bukit Jenalik area and deprived the appellants of food and drink to weed them out and prevent any further action by them. He concluded that the killings of two people at Bukit Jenalik should not in any way obscure the facts.

In the further submissions, however, he pointed us to p 13 of the grounds of judgment of the learned High Court judge where the learned trial judge had stated:

> The Burden of Proof At The Close of the Prosecution Case
>
> Notwithstanding the fact that all the nineteen accused persons had been tried in accordance with the Essential (Security Cases) Regulations 1975 and that reg 13 of the said Regulation states that when the case for the prosecution is closed, the court shall call on the accused to enter on his defence, this court is still bound by the majority decision of the Federal Court in the case of *Public Prosecutor v Sihabduin bin Haji Salleh v Anor* [1980] 2 MLJ 273 wherein it was held that in a security case at the end of the prosecution case the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him.

He accordingly referred to the case of *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 where a five member panel of this court with a 4:1 majority had held that at the end of the prosecution case in an ESCAR proceeding, the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a prima facie case against him. This was followed three years later in another ESCAR case by a three member panel of this court in *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221.

Again, in *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350, this court ruled that although a submission of no case to answer was not made at the close of the prosecution case, it is the duty of the court to intervene and set right any miscarriage of justice that may have resulted in consequence. It further held that in that appeal, the trial judge should not have called upon the appellant to make his defence but should have acquitted him upon both charges at the close of the prosecution case despite the language of reg 13 of ESCAR which reads:

> Procedure after conclusion of case for prosecution
>
> When the case for the prosecution is closed, the court shall call on the accused to enter on his defence.

In line with these three decisions, learned counsel also referred to a number of other authorities which deal with the test of 'a prima facie case' or the test of 'beyond reasonable doubt' but I shall disregard them as they are not ESCAR cases.

A He argued that the learned trial judge misdirected himself as regards the standard of proof as at pp 78 and 79 of the grounds of judgment, he followed s 182A of the Criminal Procedure Code ('the CPC') and not reg 17 of ESCAR which states:

> Court's decision
>
> B The court shall decide on the guilt or innocence of the accused only at the conclusion of the case for the defence, and it shall decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure, or for any defect concerning the charge.

C Hasnal Rezua Merican for the second, third, fourth, seventh, eighth, 14th, 15th and 19th appellants, in the course of the second submissions, raised two points. He said that even if this court adopts regs 13 and 17 of ESCAR and reverses the decision in *Public Prosecutor v Sihabduin*, the evidence at the defence stage cannot be used. He also referred to reg 21(3) of ESCAR on hearsay and said that the prosecution had failed to prove a prima facie case. D Answering questions from the bench, he submitted that there had been a serious misapplication of the law in the High Court and a retrial is the only answer.

Zainal Ithnin for the fifth, sixth and 13th appellants, adopted the submissions of earlier counsel but referred to the extract in the notes of proceedings in the High Court where the then learned Attorney-General E had said:

> YB Attorney-General:
>
> The prosecution although we have used ESCAR we will as far as possible endeavor to have an open trial without sticking to the stringent provisions of ESCAR.

F Learned counsel added that a retrial is the only answer and should this court hold that the trial is a nullity, then all the appellants should be acquitted and discharged.

Mohamed Hanipa Maidin for the ninth, 11th, 16th, 17th and 18th appellants, in adopting the earlier views, submitted that the issue is whether G the appellants got a fair trial. He said that if the ESCAR were used, the burden would be less on the prosecution but the law must be clearly stated and applied. The effect of this, he added, was that the trial was a nullity whether or not it benefits the appellants as art 5(1) of the Federal Constitution had been breached. He contended that there had been a miscarriage of justice and since a retrial was not practical, all the appellants H should be acquitted and discharged.

Faiz Fadzil for the tenth and twelfth appellants submitted that the ESCAR did not override other laws and s 2 of the Evidence Act 1950 did not cover it.

The learned Attorney-General submitted that there were substantial I differences between the ESCAR and the normal rules of evidence. He explained that at the beginning of the trial, the learned then Attorney-General had told the learned trial judge that the prosecution was using the

ESCAR for the venue of the trial on security grounds but was avoiding applying the stringent rules under the ESCAR.

He added that the ESCAR was very much in favor of the prosecution and that going halfway was all right as the appellants were not prejudiced. In fact, he said, there were never any complaints from any of the defence counsel. Could they now object, he asked, since the prosecution had chosen to take the heavier burden.

When questioned by the presiding judge what happens when a decision is made halfway that satisfies the ESCAR but not the normal rules of procedure, the learned Attorney-General said the ESCAR would have to be followed and agreed with the presiding judge that the prosecution cannot actually opt out of ESCAR the way they did.

In reply, Karpal Singh submitted, and this reply was adopted by all other learned defence counsel, that the question of prejudice did not arise. He said that under the ESCAR the Court of Appeal is bypassed for appeals whereas under the normal rules of procedure, any appeal would have to go to the Court of Appeal first. He added that the entire trial is a nullity and expediency must be put aside. He submitted that the question of a retrial does not arise if there had been no trial. He said that the learned trial judge had misdirected himself by calling the defence under the CPC and not under the ESCAR. Any decision by this court, he said, would also affect those who had pleaded guilty.

Although the ESCAR was not used despite the certificate presented at the outset, it is my view that the appellants had not been prejudiced by the stance of the prosecution team in resorting to the normal rules of procedure and evidence. If at all, this concession is more to the advantage of the appellants. Since the trial proceeded on an ESCAR certificate, my finding is that the appeal would be direct to this court.

To my mind, reg 13 of ESCAR is crystal clear. When the case for the prosecution is closed, the court shall call on the accused to enter on his defence. The language is plain and simple. There is no mention of the standard of proof. Its effect is made clearer when reg 17 is read in that the decision on the guilt or innocence of the accused can be made only after hearing both the prosecution and the defence.

In *Public Prosecutor v Sihabduin*, Suffian LP originally sat only with Wan Sulaiman and Syed Othman FJJ as he said (at pp 273–274):

> This point was first argued before three of us, on 3 July 1979, when we reserved judgment. In the course of considering our draft judgment, we decided that it would be desirable to have a point of law of such importance as this re-argued before five judges; and accordingly it was re-argued on 23 June 1980, in the presence of two additional members of the court, namely our brothers Raja Azlan Shah, CJ Malaya, and Lee Hun Hoe, CJ Borneo.

The learned Lord President must have found the necessity to have the two additional judges because of the two unreported judgments of the High Court before that which agreed with the dissenting view. He had referred to them at p 275 of the report where it is stated:

First, there is a decision of Harun J on 26 October 1976, in *Public Prosecutor v Chea Soon Hoong alias Foo Soh Loh (Federal Territory Criminal Trial No 23 of 1976)* unreported, in which he appears to have said that at the end of the prosecution case, the court must call on the accused to enter on his defence, regardless. He said:

> There are two main, ingredients to prove a charge under s 57 of the Internal Security Act, viz:
>
> (i) the offence was committed in a security area without lawful excuse; and
>
> (ii) the accused had under his control the firearm or ammunition without lawful authority.
>
> By virtue of reg 17 of the Essential (Security Cases) Regulations, I must accept the evidence of the prosecution as to the facts of the case at this stage. This covers the second ingredient.

The second case is a decision of Azmi J on 28 January 1977, in *Public Prosecutor v Yap Seng Keat* Federal Territory Criminal Trial No 49 of 1976 also unreported, in which he also appears to have said the same thing as Harun J. He said:

> The main encroachment into the ordinary practice of criminal law made by these Regulations is that, it is not necessary for the prosecution to prove their case beyond reasonable doubt at the close of their case, and it seems to me that the principle that the defence should not be called merely to clear any doubt in the prosecution case or to supplement any deficiency in their case does not apply.

If the *Sihabduin* panel had remained with the original three members, then the overall tally with the two High Court judgments would mean that the majority view in *Public Prosecutor v Sihabduin* would be two against the dissenting three. With the additional two members, it now stands as four against three. Disregarding the numbers, I would hold that regs 13 and 17 of ESCAR are specific provisions which override the general provision on this point in the CPC. As such, the dissenting judgment in *Public Prosecutor v Sihabduin* appears to be the correct view. In effect, the defence must be called in all cases which had been certified under the ESCAR.

The charge against all the appellants read as follows:

> That all of you from the month of June 2000 until 6 July 2000 at various places in the state of Perak Darul Ridzuan, namely:
>
> (a) Post 2, KM 19, Kuala Rhui, Jalanraya Timur Barat, Grik, Hulu Perak;
>
> (b) Batalion 304, Infantri (AW), Kem Grik, Grik, Hulu Perak; and
>
> (c) Bukit Jenalik, Kemajuan Tanah Ngor Sauk, Mukim Cagar Galah, Daerah Kuala Kangsar,
>
> waged war against the Yang di-Pertuan Agong and thereby committed an offence punishable under s 121 of the Penal Code.

Submissions on the charge focused on the issue of common intention under s 34 of the Penal Code ('the PC') and the particulars therein. As for common intention, it was argued that each appellant faced the charge individually and not together.

Reference was made to *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 where the facts were that a husband and wife were jointly charged as the first and second accused respectively for trafficking in 3455.51g of cannabis in various parts of the house they stayed in with their children. A third person found in the house became a prosecution witness.

It was held by the High Court, among other things, that where two or more persons are jointly charged pursuant to s 170 of the CPC, the prosecution need not show a common intention but must establish the guilt of each accused as a separate exercise and each may be convicted independently. Conversely, in cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention.

In *Muhamad Safarudin bin Baba & Anor v Public Prosecutor* [2002] 4 MLJ 353, the two appellants had been arrested with a box containing 1031.9g of cannabis which was held by the second appellant. The trial judge called for the defence of the first appellant after applying the presumption of common intention under s 34 of the PC and for the defence of the second appellant upon invoking the statutory presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA'). Both were found guilty and sentenced to death.

On appeal, the Court of Appeal held that the trial judge had misdirected himself when he convicted the second appellant on trafficking and common intention. The second appellant was not found in actual possession of such drugs. He was only deemed to have been in possession and deemed to have known the nature of such drugs which arose from the finding that the box containing the said drugs was within the custody or under his control. The statutory presumption under s 37(da) of the DDA applies only to actual possession. Thus, by convicting him for trafficking, the trial judge had erred by indirectly using the presumption of trafficking under s 37(d) of the DDA to invoke the presumption of trafficking under s 37(da). Therefore, the second appellant could have only been convicted of an offence under s 6 of the DDA for possession of such drugs and punishable under s 39A(2) thereof.

It also held that common intention within the meaning of s 34 of the PC implies a pre-arranged plan and to convict an accused person of an offence applying the section involves proving that the criminal act was done in concert pursuant to the pre-arranged plan. It would be difficult, if not impossible, to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases, it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case. Although the conduct of the first appellant during the relevant period and his awareness that the second appellant was carrying the box might be relevant factors in considering the element of common intention, but the knowledge presumed by s 37(d) of the DDA upon the second appellant ought not to have been imputed to the first appellant because he did not have the custody or control of the box. These factors, in themselves, at most raise the suspicion that the

A first appellant was involved but suspicion, regardless of its degree, is not evidence.

As for common intention, p 103 of *Ratanlal and Dhirajlal's Law of Crimes* (25th Ed) states:

B > This section is restricted to common intention and does not embrace any knowledge. It does not require proof that any particular accused was responsible for the commission of the actual offence. It is not restricted to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. It can well be applied to cases in which offence is committed by only one or two or three persons who all had a common intention. This section C applies when a criminal act is done by several persons, in furtherance of the common intention of all. In such a case, the other offenders are liable for that act in the same manner as the principal offender, as if the act were done by such offenders also. This section does not whittle down or do away, with the liability of the principal offender, committing the principal act and merely provides that all other offenders are also vicariously liable.

D > The common intention must be to commit the particular offence. The common intention of one must not only be known to the other but must also be shared by him. This section refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act.

E As the common intention is not reflected in the charge against the appellants, p 126 of the same textbook provides that s 34 can be applied even though no charge is framed if the evidence on record establishes it. In such a situation, the absence of charge, by itself, cannot be said to be fatal, and before a conviction can be set aside, it must be shown that the absence of charge had caused prejudice to the accused. I hold that, in these F circumstances, it has not.

Much has been said about the lack of particulars in the charge as certain other preparatory acts to the waging of war which came out in the evidence had not been included. These would be the bombing of the Guinness brewery in Petaling Jaya, the Carlsberg brewery in Shah Alam, the Hindu G temple in Batu Caves and the attack on the electricity cable tower and installations belonging to the Tenaga Nasional Berhad at Lata Kekabu in Lenggong, Perak. My view, based on text authorities and decided cases, is that these particulars should have been included in the charge but the failure to do so does not render the charge defective. Even if it does, reg 17 of ESCAR covers the situation. Hence, this argument lacks merit.

H In conclusion, I agree with the findings of my learned brother Steve Shim CJ (Sabah and Sarawak) except that on the issue of regs 13 and 17 of ESCAR, my view is that the dissenting judgment, and not the majority decision, in *Public Prosecutor v Sihabduin*'s case is correct. The defence would have to be called in any case.

I Accordingly, the appeals are dismissed except that the cross appeal against the tenth appellant is allowed and the sentence of life imprisonment imposed on him is substituted for the sentence of death.

Siti Norma Yaacob FCJ: I associate myself with the reasons given in the separate judgments of my brother judges in upholding the convictions of all the nineteen appellants before us. However, I need to mention that on the issue of regs 13 and 17 of the ESCAR, I agree with my brother, Abdul Malek Ahmad, FCJ, that in view of the clear and unambiguous provisions of the two regulations, the dissenting judgment in *Public Prosecutor v Sihabduin* must prevail.

I will now consider the appeals on sentence.

The first appellant (Mohd Amin bin Mohd Razali) who had originally filed a notice of appeal against both his conviction and sentence was content to drop his appeal against his conviction and confined his submission solely against the sentence of death imposed by the court below.

Besides the first appellant, the second and third appellants (Zahit bin Muslim and Jamaludin bin Darus) are also sentenced to death and they are also appealing against their sentences. Appeals have also been lodged by the fourth to ninteenth appellants against their sentences of life imprisonment which under s 130A(b) of the PC mean imprisonment for the duration of their natural lives.

A conviction under s 121 of the PC carries with it two penalties in the alternative, death or life imprisonment, and a third sentence that if the death penalty is not pronounced, a convicted person shall also be liable to a fine. The judge in the court below dealt only with the sentences in the alternative and this should be rightfully so considering the nature of the offence that has been committed and the extent of the participation of each of the nineteen appellants in waging war against the Yang di-Pertuan Agong.

There is also a cross appeal by the public prosecutor pressing for the death penalty against the fourth to the nineteen appellants. In view of this cross appeal and the appeals of the first to the third appellants against their sentences of death, it is only right and proper that I have to consider whether the death penalty is excessive insofar as the first to the third appellants are concerned and inadequate as regards the sentences of life imprisonment handed to the fourth to the nineteen appellants.

Relevance to the adequacy or inadequacy of the sentences imposed on each of the nineteen appellants must naturally lead to the consideration of the roles played by each of them when they, together with ten other members of the Al-Maunah group, who had already pleaded guilty to an alternative charge, gathered at their base camp at Bukit Jenalik between 29 June 2000 to 6 July 2000, to put into motion the intention they had harbored to wage war against the Yang di-Pertuan Agong and the legitimate Government of the day.

Mr Karpal Singh, learned counsel for the first appellant has reminded us that in the history of criminal jurisprudence in this country, this is the first time that a conviction under s 121 of the PC has been recorded.

For that very reason and coupled by the fact that a conviction under s 121 carries with it an alternative punishment as well, the ends of justice

A will be served if a sentence of life imprisonment be substituted for the death sentence. He further stressed that the maximum sentence of death be imposed only in the rarest of rare cases of which this is not.

It is not disputed that the first appellant was the mastermind of the tragedy that had befallen upon him. As the President of the Al-Maunah B group and the Khalifah Mujahuddin Malaysia, he was the leader of the group of 28 men who had gathered at Bukit Jenalik and organized the planned operations to wage war against the Yang di-Pertuan Agong. His preparatory actions include the following:

(1) instructing PWI a Lance Corporal at Camp Desa Pahlawan, Kota C Baru and a former member of the Al-Maunah group to purchase 28 pairs of camouflaged army uniforms. He provided RM2,1900 to PWI to purchase uniforms from PW2 and PW3, two brothers who specialize in accepting orders from uniformed personnel for the making of such uniforms. He later distributed the uniforms to members of the group and all the 20 that were involved in the arms D heist were dressed in those uniforms.

(2) inquiring from PW6, a villager at Kampong Kati, Kuala Kangsar about the availability of rented premises in the area.PW6 took him to PW7, from whom the first appellant rented a house in June 2000 on payment of RM300 to PW7, as advance rental for three months. It E was at this house that the Al-Maunah group repainted the three stolen Pajero vehicles with that shade of green which is associated to military vehicles, equipped them with false military number plates and subsequently used them to transport the various arms seized at the two army camps to Bukit Jenalik.

F (3) purchasing 87 pieces of swords, the 'parang kembar' from PW14, a handicraft seller at the Central Market, Kuala Lumpur between March to June 2000. Each sword cost him RM370.00 and he paid PW14, RM32,190 in cash and cheque and these transactions were recorded by PW14 in his diary, P9. There is also evidence to show that the swords made their way to Bukit Jenalik as members of the Al-G Maunah group were seen armed with them. The swords were reputed to have magical powers and they were seen later placed in front of the trenches built around the hill surrounding Bukit Jenalik to prevent the security forces from entering the camp.

(4) staging the two arms heist and seizing the various army weapons and H army equipments at Post 2, Kuala Rhui and at Battalion 304, Kem Sik. The first appellant led nineteen other members of his group in the three Pajero vehicles to the two army camps in the early hours of 2 July 2000. Before proceeding to the an-ny camps they made a stop at an all-night food stall very close to Kem 304. According to PW10, the waitress at the stall, three Pajero vehicles arrived at the stall at 2.30am I and 20 men in camouflaged uniforms came out from the vehicles. She recognized the first appellant as the person who ordered the food and drinks for all 20 of them.

It was following this very early breakfast that all 20 members of the Al-Maunah group got into the three Pajero vehicles and proceeded to Post 2 Kuala Rhui Camp at 2.50am and then to Kem 304 at 4.15am and staged the two arms heist. The stolen army weapons and other army equipments were later recovered by the security forces at Bukit Jenalik on 6 July 2000 when all 29 members including the nineteen appellants surrendered to the police.

Details of the arms heist at the two army camps are clearly set out by the learned judge in his judgment gleaned from the evidence of PW15–PW27, the army personnel that were manning Post 2, and the evidence of PW28, PW29, PW34 – PW36, the officers that were on duty at Camp 304 at the material times. In summary, I single out the following facts that are of particular interests:

(1) the reason given for the early morning visits was to conduct emergency spot checks of all the ammunitions stored at both camps.

(2) dressed as senior army officers the first appellant passed himself as an Army Major whilst the third appellant assumed the role of a Lieutenant Colonel.

(3) impressed by the manner in which the first and the third appellants conducted themselves and assured by the presence of the three Pajero vehicles bearing the military registration numbers beginning with the alphabet 'Z', all the military personnel at the two army camps were duped into allowing the group to take possession of all but one of the various army weapons, ammunitions and other army equipments and some even helped the group to carry the weapons into the three Pajeros. The one that was not taken was an M16 that was under the bed of one of the guards at Post 2.

It was under those circumstances that the weapons, ammunitions and other army equipments stored at the two army camps found their way to Bukit Jenalik in the early hours of 2 July 2000.

Apart from the preparatory actions that had been spearheaded by the first appellant, there are his other actions at Bukit Jenalik which are quite eye openers. Following the arms heist, he had distributed the seized arms to his members for practice purposes. It was following the unusual sounds of firearms that the security forces were alerted and they surrounded and condoned off Bukit Jenalik and a number of security personnel were deployed to penetrate the Al-Maunah's camp. Two of the police personnel, Sergeant Mohd Shah bin Ahmad (PW44) and Detective Corporal Sanghadevan, a civilian, Jaafar bin Puteh (Jaafar) and an army personnel, Trooper Matthew, were taken hostages by the Al-Maunah group.

PW44 lived to tell us what happened to him and Sanghadevan during the four days and three nights he was held captive. When the first appellant realized that PW44 and Sanghadevan were police personnel he ordered the other members of the group to abuse and torture them. During the day, they were made to dig trenches along the sides of Bukit Jenalik and these trenches were to serve as a defence in the event of an attack on the camp.

A At night they were guarded and tied to a durian tree. It was in one of these trenches that PW44 and Sanghadevan buried Trooper Matthew and they were ordered to do so by the first appellant.

Trooper Matthew was apprehended by the tenth appellant (Jemari bin Jusoh) and when the first appellant realized the identity of Trooper Matthew, the first appellant tortured him by shooting his leg. Not satisfied with his brutal act, he ordered the tenth appellant to shoot Trooper Matthew in cold blood.

A member of the group, Abu Bakar bin Ismail, was shot by the security forces on the morning of 5 July 2000. In retaliation, the first appellant aided by his followers returned fire against the security forces and it was during this cross fire that Sanghadevan was shot dead. PW44 and Jaafar buried him in the same hole where Trooper Matthew was buried a day earlier. Jaafar, the innocent civilian who had wandered into the Al-Maunah camp searching for durians and PW44 were rescued on 6 July 2000, but Jaafar did not live long enough to testify as he died before the trial commenced and his recorded statement, P159, was used in the court below under s 112 of the CPC.

The first appellant was also responsible for directing his men to bomb certain installations namely Carlsberg Brewery at Shah Alam, the Guinness and Anchor Brewery at Petaling Jaya, and the Hindu Temple at Batu Caves. The bomb caused a power failure at Carlsberg, the shots at Guinness failed to explode and three explosions took place at the Temple. The first appellant also fired a shot at the cable tower of Tenaga Nasional Berhad at Lata Kekabu, Lenggong, Perak. Finally there is the evidence that he had used a radio set which he had seized during the arms heist to broadcast the objectives and struggles of the Al-Maunah group. He would have no difficulty operating the radio set as he had worked as a signal operator at Kem 304 before the incident.

It is against this background that we are now asked to consider substituting the first appellant's sentence of death to that of life imprisonment. In his judgment, the learned judge has referred to the principles of sentencing, and guided by case law, he had considered the due weight to be given to the penalty of the offence committed, the public interest factor and the mitigating pleas put forward.

I see no reason to disturb the exercise of the judge's discretion as regards sentence. Whilst I appreciate that the first appellant is convicted of an offence for which nobody has been convicted before, this trend must be nipped in the bud and public interest demands that in the rarest of such rare cases, life imprisonment would not be an appropriate penalty. On that finding the sentence of death pronounced on the first appellant is hereby confirmed.

As the Deputy President of the Al-Maunah group, the second appellant was the second man in command after the first appellant. An ex-commando who had served in the Police Force Unit Vat 69, his past experience and training in the use of various firearms to combat the communist insurgency in this country came in very handy and he was charged with training the

members of the group as to the use of the various arms seized at the army camps. A

Before the arms heist, he had brought the first appellant to Ipoh where the first appellant ordered six military number plates, three of which were later used on the three Pajero vehicles. On this trip to Ipoh, green paint was also purchased and the second appellant saw members of the group painting the three Pajero vehicles with the green paint at the rented premises in Kampong Kati. He had also accompanied the first appellant to purchase the 'parang kembar' at the Central Market, Kuala Lumpur. B

Armed with an M16, he had accompanied the first appellant to Lata Kekabu, Lenggong and saw the first appellant fire the cable tower of the Tenaga Nasional Berhad so as to cut off the electricity supply throughout the state of Perak. C

The second appellant also confirmed that two of the four hostages, Trooper Matthew and Corporal Sanghadevan were killed while they were in their custody. He also saw the first appellant using the radio set twice and on both occasions heard him making demands to the military. D

As the first appellant's right hand man, the second appellant must have known of the former's plans to topple the legitimate government of the day. His deep involvement and his active participation of which I have related had convinced the learned judge to impose the maximum sentence and I have no reason to disagree on that finding. To that end the sentence of death imposed by the court below is confirmed. E

The third appellant (Jamaludin bin Darus) is the self confessed traitor for he was a serving military officer with the Malaysian Armed Forces holding the rank of a Major at the time of the offence. During the arms heist, he assumed the role of a Lieutenant Colonel and in demonstrating his authority he had suffered the guards manning the army camp at Post 2, the indignity of squatting and walking like a duck, hopping like a frog, and doing forward and side rolls as well as sit-ups. With the seized weapons he had taught the other members of the group to use them and as the Chief of the Al-Maunah of the Northern Zone (Khalifah Utara) he was very much in control of the situation at Bukit Jenalik as the first appellant's right hand man. It was his acts of betrayal and disloyalty that had convinced the learned judge to prefer the maximum sentence against him. I endorse that finding and confirm the sentence of death imposed on the third appellant. F G

That leaves me with the sentences of life imprisonment that had been ordered by the learned judge on the fourth to ninth appellants. The lesser punishment had been preferred against them for unlike the first to third appellants they did not play any lead roles but as a group their presence at Bukit Jenalik carrying out supporting roles were sufficient to contribute to the furtherance of the objectives of the Al-Maunah group. I can do no better than to highlight their roles. H

I begin with the fourth appellant, (Abdul Ghani bin Ali @ Ahmad), a Mechanical Engineer who had worked as a lecturer on 'Machine Building & Maintenance Technology', at the Malaysian French Institute in Bandar Baru Bangi. He became a member of the Al-Maunah in 1999 as he was I

A attracted to the courses of martial art conducted by the group as well as courses in the spiritual aspects of Islam.

He arrived at Bukit Jenalik on 30 June 2000, together with his younger brother, Abdul Halim. He was a passive participant at the two arms heist as he stood by and saw large catchments of arms being loaded into the three Pajero vehicles. It is his contention that it was only after his younger brother B was shot dead during the cross fire between the security forces and the group that he realized that he was involved in something more sinister than what he had bargained for.

Taking the fifth appellant, (Che Sabri bin Che Jaafar), the sixth appellant, (Mohd Ramly bin Mohamood) and the thirteen appellant, C (Yunus bin Hussin), together, they hail from Kelantan and represented the group members from that State. Before coming to Bukit Jenalik, they were met by the first appellant at Sauk, Kuala Kangsar, and he brought them to Bukit Jenalik, where the sixth and 13th appellants were made to cook for the other members of the group.

When all the three appellants saw the large assortment of weapons and D became aware that PW44, Sanghadevan and Jaafar were detained against their will and were made to dig trenches around the hill, they decided to escape but were not successful in their attempt.

The 17th appellant, (Suhaimi bin Hasbullah), also hails from Kelantan and he was assigned the task of setting up camps for the group, to erect a E structure from woods gathered in the area where cooking could be done and generally to keep the whole area in order. He was threatened by the first appellant that he would be shot should he attempt to leave Bukit Jenalik.

Like the fourth appellant, the eighth appellant (Mohd Zaini bin Mohd Zainal), was a passive participant during the two arms heist but was coached into firing one of the weapons that was seized. He saw PW44 and F Sanghadevan tied to the durian tree and had also seen them digging trenches around the hill. He also saw the tenth appellant escorting Trooper Matthew to the first appellant.

The ninth appellant, (Kamarudin bin Mustafar), like the seventh appellant, set up camp for the group and kept the whole area clean. He was G the driver of the second Pajero that proceeded in convoy to the two army camps and upon their return to Bukit Jenalik, the first appellant gave him an Ml 6 but he denied firing any shot from the gun.

The tenth appellant, (Jemari bin Jusoh), a mechanic, was the infamous member who shot dead Trooper Matthew in cold blood on the instruction of the first appellant. His other misdeeds include the following:

H

(1) spraying the three Pajero vehicles green at the rented premises in Kampong Kati;

(2) participating in the arms heist;

(3) firing a few shots from an M16 after he was taught the use of it by the I third appellant;

(4) witnessing the detentions of PW44 and Corporal Sanghadevan and saw them tied to a durian tree; and

(5) apprehending Trooper Matthew and bringing him to the first appellant and saw the first appellant torture Trooper Matthew by firing at the latter's leg.

The 11th appellant (Mohammed Faudzi bin Hamdan), a storekeeper saw members of the group spraying the three Pajero vehicles with the green paint. He admitted wearing the army uniform that was given to him by the first appellant and was one of the 20 who went to the two army camps. He helped to unload the various arms from the three Pajero vehicles and carried them to the camp site. He also noticed the detentions of PW44 and Sanghadevan.

When a member of the group, Abu Bakar bin Ismail, (who had pleaded guilty to the alternative charge), was wounded by the security forces on morning of 5 July 2000, the 11th appellant was given the responsibility of attending and guarding Abu Bakar.

The 12th appellant, (Ibrahim bin Dris), had served in the Armed Forces for 20 years and retired as a Sergeant Major. He has had training in the use of firearms and was adept with M16's. He was a passenger in the second Pajero driven by the ninth appellant and helped to load the various weapons seized into the Pajero. He taught the other members of the group the safety aspects of an M16 and was fully aware that the group had held four hostages at the camp site.

As I have already dealt with the 13th appellant, I now proceed to the 14th appellant, (Mohd Amin bin Othman). He holds a Bachelor's Degree in Science from the National University and had worked as a teacher and for a computer company in Alor Setar. He carried the many boxes of food from the bottom of the hill to the camp site, set up camps and helped to prepare food.

He was one of the nine members who stayed at the camp whilst the other 20 participated in the arms heist and he did see the large assortment of weapons on the morning of 2 July 2000.

He was not prepared to describe himself as a guard at the camp but all the same he was aware that two police personnel had been held hostages by the group and was also aware that a member of the group had shot dead Trooper Matthew.

The 15th appellant (Idris bin Anas), is a technical assistant with the Telecoms Department, Malaysia. On arrival at Bukit Jenalik on the evening of 30 June 2000, his first task was to clear the area where they were to set up the living quarters of the group. He was also one of the 20 chosen by the first appellant to accompany him to the two army camps and was a passenger in the Pajero driven by the ninth appellant.

He saw the trenches dug by PW44 and Sanghadevan and was aware that Trooper Matthew was shot a day before Sanghadevan suffered the same fate.

The 16th appellant (Ahmad Sarkawi bin Sulong), a mechanic, was not in the group of 20 that was involved in the arms heist but he saw the large assortment of weapons brought back by the group on the morning of 2 July 2000.

A He was tasked with the responsibility of preventing any infilteration into the camp from outside and it was in the course of carrying out his duties that he apprehended PW44 and Sanghadevan and brought them to the is first appellant. He was then armed with an M16. He was also with the first appellant when Jaafar was apprehended.

B The 17th appellant (Zainal bin Mohd Jailani), stayed back at the camp on the night of the arms heist but helped in unloading the large assortment of weapons from the three Pajero vehicles. He saw Sanghadevan digging the trenches and he learnt later that he was shot dead as did Trooper Matthew.

Nasruddin bin Mohd Jailani, the 18th appellant, is the elder brother of the 17th appellant. Like his younger brother, he was not involved in the C arms heist but saw the large collection of weapons brought back by the group and saw the first appellant firing one of them.

On the night of 3 July 2000, he had tried with the 16th appellant to leave Bukit Jenalik but was unsuccessful when the 16th appellant accidentally tripped on a trick flair and the area was lighted up and at the same time a shot was fired in their direction.

D Finally, I come to the 19th appellant (Mohd Bukhari bin Ismail), a graduate of Al-Azhar University in Egypt with a BA Honours degree in Islamic Studies. He worked as a clerk for the Al-Maunah and was responsible for maintaining its accounts and collecting fees from the members.

E Like most of the group, he arrived at Bukit Jenalik on the evening of 30 June 2000, and he started putting up a camp and on the next day helped the other members to clean up the area.

He was not a convincing witness as all he was prepared to say was that he only saw the first appellant armed with a weapon, noticed two hostages F and perceived the presence of three trenches. It is no wonder that the learned judge did not believe him.

The learned judge has rightly considered the less than dominant roles played by the fourth to the 19th appellants and except for one I can find no reason to disturb the sentences imposed on them. The exception is the tenth appellant who showed no qualms about shooting Trooper Matthew in cold G blood when ordered to do so by the first appellant. It is this one act of brutal violence that singles him out as demonstrating the extent to which he was capable of doing so as to meet the illegal objective of the Al-Maunah.

I agree with the other reasons given by my learned brother, Steve Shim CJ (Sabah and Sarawak), that the sentence of life imprisonment H handed to the tenth appellant to be inadequate and I substitute this with the sentence of death.

On the whole the appeals by the first, second and third appellants against their sentences of death are dismissed. The appeals of the public prosecutor against the sentences of the fourth to the ninth appellants, the 11th to the 19th appellants are also dismissed and their sentences of life I imprisonment are confirmed. However, the appeal of the public prosecutor against the sentence of the tenth appellant is allowed and the death penalty is substituted for the sentence of life imprisonment.

Haidar FCJ: I have read the judgments of the learned Chief Judge, Sabah and Sarawak as well as that of Abdul Malek Ahmad and Siti Norma Yaakob FCJJ. I agree with them except that I would like to express my own views in respect of the application of reg 13 of the ESCAR. Regulation 13 reads:

> Procedure after conclusion of case for prosecution
>
> When the case for the prosecution is closed, the court shall call on the accused to enter on his defence.

It is clear, in my view, that in respect of security cases under ESCAR, the burden of proof imposed on the prosecution is a departure from the ordinary criminal cases provided by s 182A of the CPC. Section 182A reads:

> (1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
> (2) ...
> (3) ...

The learned judge in the court below rightly ruled that he was bound by the majority decision of the Federal Court in *Public Prosecutor v Sihabduin* which held that in a security case at the end of the prosecution case the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a prima facie case against him. Likewise, the learned CJ (Sabah and Sarawak) after reviewing *Public Prosecutor v Sihabduin, Public Prosecutor v Nordin bin Johan & Anor* and *Md Desa bin Hashim v Public Prosecutor* opined:

> On a careful consideration of the authorities cited, I find no good reason to depart from the majority view expressed in *Public Prosecutor v Sihabduin.*

In other words, the prima facie case applies to cases under ESCAR in spite of the wordings of reg 13 of ESCAR.

We were asked to depart from the majority decision in *Public Prosecutor v Sihabduin.* Abdul Malek Ahmad FCJ in his judgment after considering the relevant authorities and for the reasons stated therein took the view that regs 13 and 17 of ESCAR are specific provisions which override the general provision on the *prima facie* case in the CPC and preferred the dissenting judgment in *Public Prosecutor v Sihabduin.* Likewise, Siti Norma Yaakob FCJ took the same view in preferring to adopt the dissenting judgment of Wan Suleiman FJ in *Public Prosecutor v Sihabduin* at p 276:

> Can there be more manifest indication of the intention of Parliament to modify, in favor of the prosecution, the preexisting state Of criminal procedure in cases coming within the regulations?
>
> The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v Sir* [1980] All ER 529 seem to me to be particularly apt, for 'the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves

A consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

I would respectfully agree with the views of Abdul Malek Ahmad and Siti Norma Yaakob FCJJ.

As for the substitution of the sentence of life imprisonment in respect B of the tenth appellant to one of sentence of death by the learned CJ (Sabah and Sarawak), I agree with it for the reasons stated by the learned CJ (Sabah and Sarawak). I agree that the appeals by the first, second and third appellants against their sentences of death be dismissed and the appeals by the public prosecutor against the sentences of life imprisonment in respect of the fourth to the ninth appellants and the 11th to 19th appellants be C dismissed also.

Steve Shim CJ (Sabah and Sarawak):

Background

D Twenty-nine accused were initially charged with the offence of waging war against the Yang di-Pertuan Agong under s 121 of the PC. In the midst of the prosecution case, the learned public prosecutor decided to charge 14 of the accused under s 122. Ten of them pleaded guilty to the said charge. They were each sentenced to a term of ten years imprisonment. The E prosecution proceeded against the remaining 19 accused under s 121 of the PC. After a lengthy trial, they were convicted under the said s 121. The first, second and third accused persons were sentenced to death while the remaining 16 were each sentenced to life imprisonment. They have all filed their appeals against conviction and sentence. The learned public prosecutor has counter appealed against the sentence of life imprisonment F imposed on each of the 16 accused.

The law

At the outset, the learned trial judge addressed himself on the relevant law. Here, he touched on the ingredients necessary to sustain the charge under G s 121 of the PC. He stated, quite correctly, that there were two essential ingredients involved, to wit, that the accused had waged war and that such war was against the Yang di-Pertuan Agong. He cited in support various passages from *Ratanlal & Dhirajlah's Law of Crimes* as well as *Archbold*, which, in the main, explained the scope of s 121. It was stated that the true H criterion of the offence was the purpose or intention with which the gathering assembled; that the object of the gathering must be to attain, by force and violence, an object of a general public nature thereby striking directly against the authority of the government. The learned trial judge also relied on a number of case authorities. The observation in one of them bears repetition herein. In *Aung Hla & Ors v Emperor (Air)* 1931 Rangoon 235, I the court said:

> The words 'waging war' in s 121 are synonymous with levying war in statute 25, Edward 3, C 2, and where a multitude rises and assemblies to attain by

> force and violence any object of general public nature, it amounts to waging war against the Majesty of the King. It is not the number or the forces but purpose and the intention which congregates and assembles them together and gives the impulse in arming and rising that constitutes the crime and distinguishes it from riot or any other rising for any private purpose. There is further no distinction between principal and accessory and all who take part in the treasonable act incur the same guilt an are liable to the same punishment.

In turn, the court in that case cited with approval the observation of Holt LCJ in *Sir John Friend* who said:

> If persons do assemble themselves and act with force in opposition to some law which they think inconvenient and hope thereby to get it repealed, this is a levying war and treason ... . The question always is whether the intent is, by force and violence, to attain an object of a general and public nature by any instruments or by dint of their numbers. Whoever incites, advises, encourages or is in any way aiding to such a multitude so assembled with such intent, though he does not personally appear among them or with his own hands, commit any violence whatsoever, yet he is equally a principal with those who act and guilty of high treason.

Evaluation of evidence

It is in the light of the relevant law and legal principles aforesaid that the learned trial judge proceeded to deal with the issues raised by the defence. Prominent among these were: (a) whether the omission of the words 'jointly' or 'with common intention' in the charge had rendered it defective in law; and (b) whether the alternative charge under s 122 of the PC against some of the accused had attracted the provisions of art 8(1) of the Federal Constitution. After discussing the issues at some length, the learned trial judge came to a negative conclusion on both counts. I find no reason to disturb those conclusions. There are no errors involved.

Thereafter the learned trial judge proceeded to address himself on two aspects of the prosecution case, namely, the preparation to wage war by the accused and the act of waging war against the proper authorities. In considering the element of preparation, he alluded to evidence which established the following facts: the purchase of army uniforms; the acquisition of three Pajero vehicles; the renting of a house; the purchase and collection of swords called 'parang kembar'; the illegal seizure of military weapons at Post 2, Kuala Rhui Camp and at Batalion 304, Kem Grik; the recovery of military weapons and equipment at Bukit Jenalik by the security forces. The learned trial judge concluded that all those acts were aimed at challenging or destabilizing the authority of the government and establishing a so-called 'Islamic State'. As regards the element of waging war, the learned trial judge touched on evidence relating to the torture and killing of two hostages at Bukit Jenalik; the attack on members of the security forces by the accused; the various types of weapons seized at Bukit Jenalik where all the accused were holed up; the separate but orchestrated attacks at various places in Petaling Jaya, Shah Alam and Batu Caves including the shooting of the cable tower and installations belonging to

Tenaga Nasional Berhad (TNB) at Lata Kekabu. He took the view that all these factors demonstrated the clear commitment and intention of the accused in challenging the authority of the government. At the end of the prosecution case, he came to this conclusion:

> Having regard to the totality of the evidence adduced by the prosecution and after having considered carefully the submission of learned counsel for all the accused and the prosecution, I am satisfied at the close of the prosecution case that the prosecution has made out a prima facie case against all the accused. It is my finding that the prosecution has proven the essential ingredients of the charge against all the accused for the offence under s 121 of the Penal Code. I thereby ordered all the nineteen accused to enter their defence on the charge framed against them.

Essential (Security Cases) (Amendment) Regulations 1975

At this point, I should perhaps draw attention to the fact that the learned public prosecutor had, on 8 August 2000, issued out a certificate pursuant to the ESCAR, in effect classifying the offence with which the accused were charged as a security offence. Quite conceivably this had brought into play the provisions of ESCAR, in particular reg 2(2) thereof which stipulates:

> (2) Where the commission of any offence against any written law other than ss 57, 58, 59, 60, 61 and 62 of the Internal Security Act, 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these regulations.

Given the ex facie mandatory nature of that part of the regulation underscored above, we thought it appropriate to hear further submission from counsel on the, point. Having heard their submissions, I take the view that although the rules laid down in ESCAR were not strictly applied, it had caused no prejudice to the accused whatsoever. In conducting the trial in accordance with the rules of practice and procedure set out in the CPC, there was no miscarriage of justice caused. Indeed, in doing so, it was in effect more to the benefit of the accused.

In any event, reg 3(1) of ESCAR is significant. It reads:

> These regulations shall have effect with respect to security cases notwithstanding anything to the contrary contained in any written law; but, except in so far as the same are varied by these Regulations, the ordinary practice and procedure, where appropriate, shall apply to security cases.

Reading the judgment as a whole, it seems clear that the learned trial judge had also side-stepped the rules of evidence provided in ESCAR. This is apparent, for example, in relation to the transcripts marked as exhs P151 and P152 which were alleged to contain hearsay evidence incriminating the accused. Here, the learned trial judge had applied the normal rules of evidence. For he said at p 68 of his judgment:

> The law relating to hearsay evidence is that any evidence in the form of hearsay cannot be accepted as evidence and remain inadmissible if admitted.

He then cited with approval the following cases: *Subramaniam v Public Prosecutor* [1956] MLJ 220; *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153; and *Leith McDonald Ratten v The Queen* [1972\ AC 378 (PC). All these cases dealt with non-security offences. In security offences, reg 21(1) of ESCAR would have applied in the context of hearsay evidence, in particular that part of the provision which states as follows:

> (1) A statement made by the accused whether orally or in writing to any person shall be admissible in evidence notwithstanding that such statement —
>
> ...
>
> (f) would incriminate the accused; or
>
> (g) contains an admission or confession of guilt, or amounts to an admission or confession of guilt; or
>
> ...
>
> (3) Secondary documentary evidence shall be admissible and hearsay evidence ... may at the discretion of the court be admitted.

Quite clearly, the normal hearsay rule does not apply to reg 21(1) above.

Had the learned trial judge taken into consideration and applied the said provision, he would have little difficulty 'in admitting exhs P151 and P152. The fact that he did not do so but had instead applied the normal hearsay rule, was a factor much to the benefit of the defence. There could be no prejudice and hence no miscarriage of justice involved in so far as the accused were concerned. In short, it can be said that notwithstanding the omission (whether deliberate or otherwise) of the learned trial judge to apply the more draconian provisions of ESCAR, the accused had had a fair trial in the High Court.

Prima facie case

Now in holding that the prosecution had established a prima facie case against the accused at the end of the prosecution case, the learned trial judge had apparently applied the principle enunciated by the Federal Court in *Public Prosecutor v Sihabduin* wherein it was held that in a security case, the court was not entitled to call on the defence unless the prosecution had established a prima facie case against him. In this connection, the learned public prosecutor who is also the Attorney-General, had urged us to revisit *Public Prosecutor v Sihabduin* on account of reg 13 of ESCAR which states:

> When the case for the prosecution is closed, the court shall call on the accused to enter his defence.

It was argued that the words in reg 13 were clear and unambiguous. As such, he implored us to adopt the dissenting view of Wan Suleiman FJ in the above case who said at p 277:

> Can there be more manifest indication of the intention of Parliament to modify, in favor of the prosecution, the pre-existing state of criminal procedure in cases coming within the regulations? The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 seem to me to be particularly apt, for the 'role of the

> judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral'.

Wan Suleiman FJ took the view that reg 13 read with reg 17 made it clear that the call to enter the defence must be made in any event — that in effect the *prima facie* principle had no application in such a case. It is interesting to note that this call to jettison *Public Prosecutor v Sihabduin* is not a novel one. The public prosecutor had previously raised the issue in *Public Prosecutor v Nordin bin Johan & Anor*. The Federal Court in that case was however not persuaded. In rejecting the call, Raja Azlan Shah LP said as follows (at p 221–222):

> We have been urged by the Public Prosecutor ... to review and disapprove the decision of this court in *Public Prosecutor v Sihabduin* which held by majority that in a security case, at the end of the prosecution case, the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a prima facie case against him, and to hold that the provisions of Essential (Security Cases) Regulation 1975 mandatorily require the defence to be called in every case when the prosecution case is closed ... We do not demur in substance from the view of the law as expressed by Suffian LP. In our opinion, it is supported not only by good sense but by those considerations of justice and fair play as one would expect to find in an adversary system of trial which we practise in this country.

The public prosecutor made another attempt in *Md Desa bin Hashim v Public Prosecutor*. It ended up in naught when the Federal Court reiterated the stand taken in *Public Prosecutor v Sihabduin*. On a careful consideration of the authorities cited, I find no good reason to depart from the majority view expressed in *Public Prosecutor v Sihabduin*. In my view, there is perfect sense in the observation of Raja Azlan Shah LP in *Public Prosecutor v Nordin Bin Johan*, that Justice and fair play has become such a fundamental principle in our adversarial system of trial that it requires much more than the words used in reg 13 of ESCAR to dislodge it.

Defence case

Having held that the prosecution had established a prima facie case, the learned trial judge then proceeded to consider the various defences raised. He meticulously examined and considered these defences individually. He came to the conclusion that none of the accused had raised any reasonable doubt in the prosecution's case. I have carefully gone through his evaluation of the evidence adduced by the respective accused. I have no reason to disturb his assessment. He had not erred in law and on the facts. In my view, he was correct in holding that the prosecution had proved the charge under s 121 of the PC beyond reasonable doubt against all the accused and thereafter convicting them accordingly.

Conclusion

For the reasons stated, I find it appropriate to dismiss the appeals against conviction.

Appeals against sentence

I now proceed to deal with the appeals by the first, second and third accused against sentence. Each had been sentenced to death by the High Court. Mr Karpal Singh, counsel for the first accused (Mohd Amin bin Mohd Razali) submitted that the learned trial judge had failed to place sufficient consideration on the fact that the first accused was convicted of an uncommon offence of waging war under s 121 of the PC. He cited some Indian authorities to support the proposition that the death penalty was only imposed in the rarest of rare cases for such offence. Encik Hasnal Merican, counsel for the second and third accused was content to adopt the submission of Mr Karpal Singh. In rebuttal, the learned public prosecutor submitted that the learned trial judge had applied the principles correctly in sentencing the first, second and third accused to death. Having perused the grounds given by the learned trial judge, I tend to agree with the view expressed by the learned public prosecutor. Indeed, I would say that the learned trial judge had taken all relevant factors into consideration and had applied the correct principles in imposing not only the death sentences on the first, second and third accused but also, subject to one exception, the life sentences on the rest of the accused. The one exception relates to the fifth accused (Jemari bin Yusof). In sentencing him to life imprisonment, the learned trial judge said this:

> For OKT5 (Jemari bin Yusof) whom I have graded into this remaining group of accused, I take the view that although the evidence of this case revealed that he was the person who fired a shot at Trooper Matthew, the army personnel who was detained and killed at Bukit Jenalik, I would still consider that his role could not be equated with the dominant role played by OKT1, OKT2 and OKT3. It is my finding that the action taken by OKT5 in shooting Trooper Matthew was merely under the direction of OKT1 whom he loyally obeyed in the circumstances of the case.

It is not disputed that the fifth accused had killed Trooper Matthew purportedly on the order of the first accused. Without doubt, it was an illegal order. He must know that the person he had shot and killed was a member of the police force and an officer of the law. There is evidence that the victim was tortured before he was shot. There is evidence that the victim had pleaded for his life before it was snuffed out of him by the fifth accused. There is evidence that he was shot more than once. The fact that the fifth accused had shot Trooper Matthew in cold blood shows clearly not only his total disregard for human life but also the extent of his commitment to the common cause of overthrowing the government by force and violence. It seems clear that anyone who stood against their common cause or objective must be got rid off. Given those circumstances, I do not think that he was merely obeying the orders of the first accused but had willingly carried out a brutal act with the aim of striking fear at anyone who opposed their

common objective of overthrowing the government by force and violence. It was a deliberate act of terror. Trooper Matthew was executed to serve an illegal purpose — pure and simple.

In my view, the learned trial judge fell into error in not considering all these material factors. If he had, he would have imposed the appropriate sentence of death upon the fifth accused. In the result, I would allow the learned public prosecutor's appeal against sentence as regards the fifth accused (Jemari bin Yusof). The life sentence imposed on him should be substituted to sentence of death. In respect of the other appeals and counter appeals against sentence, I do not, for the reasons already stated, consider them to have any merit. I therefore dismiss them accordingly.

Appellants' appeals and prosecution's cross-appeals dismissed but cross appeal against the tenth appellant allowed.

Reported by Lim Lee Na